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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1713

RED LAKE BAND OF CHIPPEWA INDIANS,
Petitioner,

v.

STATE OF MINNESOTA AND COUNTIES OF ROSEAU, PENNINGTON, MARSHALL, RED LAKE, POLK, CLEARWATER, BELTRAMI, LAKE OF THE WOODS, AND KOOCHICHING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MEMORANDUM OF RESPONDENT COUNTIES CONCURRING IN THE SUGGESTION THAT CERTIORARI BE GRANTED

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MEMORANDUM OF RESPONDENT COUNTIES CONCURRING IN THE SUGGESTION THAT CERTIORARI BE GRANTED

The Counties of Roseau, Pennington, Marshall, Red Lake, Polk, Clearwater, Beltrami, Lake of the Woods, and Koochiching, Minnesota, while opposing the position taken by the petitioners, respectfully concur in the suggestion that certiorari be granted.

QUESTION PRESENTED

Whether the Red Lake Band of Chippewa Indians, following cessions of land in 1889 and 1904, retain the right to hunt and fish free of state and county regulation in the territory ceded.

STATEMENT OF THE CASE

The 1863 boundaries of the Red Lake Reservation encompass a significant portion of the territory of each of the nine respondent Counties. The respondent Counties otherwise adopt the Statement of the Case set forth in the Brief of the State of Minnesota in opposition to the Petition.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT IN LIGHT OF THE RECENT DECISIONS OF THIS COURT.

As grounds for its claim of hunting and fishing rights in the area in question, the Red Lake Band argues in its Petition that the Red Lake Reservation extends to its original 1863 boundaries despite the cession Acts of 1889 and 1904, and that the decisions of the courts below are in conflict with the recent decisions of this Court in *DeCoteau* v. *District County Court,* 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977). *See* Petition at 12-14. This claim is unfounded, however, since an examination of the 1889 and 1904 Acts in light of *Rosebud* and *DeCoteau* actually leads to the unavoidable conclusion that the Acts had the effect of disestablishing the areas that were opened to settlement by those Acts.

It is well settled that in determining questions of the disestablishment of Indian reservations or portions thereof by congressional action, the intent of Congress controls. *Rosebud,*

supra at 586; *DeCoteau, supra* at 442, 444. The analysis to be used in determining congressional intent involves an examination of several factors: the face of the act in question, its legislative history and surrounding circumstances, and the subsequent jurisdictional history. *Rosebud, supra* at 587, 603; *DeCoteau, supra* at 442, 444. Such an inquiry, when applied to the question at hand, clearly reveals a congressional intent to disestablish the areas opened to settlement by the 1889 and 1904 Acts.

The face of the Act of January 14, 1889, 25 Stat. 642 (known as the Nelson Act), clearly indicates an underlying purpose to disestablish the lands to be ceded under the Act:

> That the President of the United States is hereby authorized and directed . . . to designate and appoint three Commissioners, whose duty it shall be . . . to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota *for the complete cession and relinquishment in writing of all their title and interest in and to* all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations and to *all and so much of these two reservations as in the judgment of said Commission is not required to make and fill the allotments* required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes. . . .

§ 1, Act of January 14, 1889, 25 Stat. 642 (emphasis added). Substantially identical words of cession have been held to be "precisely suited" to disestablishment. *Rosebud, supra* at 597; *DeCoteau, supra* at 445. In keeping with the mandate of the Nelson Act, the agreement made with the Band pursuant to the Act stated that the Indians "do hereby grant, cede, relinquish, and convey to the United States all our right, title and interest in" the agreed-upon area. H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 28 (1890).

The Act of February 20, 1904, 33 Stat. 46, contained language virtually identical to that contained in the 1889 Act:

> The said Indians belonging on the Red Lake Indian Reservation, Minnesota, for the consideration hereinafter named, *do hereby cede, surrender, grant, and convey* to the United States *all their claim, right, title and interest in and to* all that part of the Red Lake Indian Reservation situate within the boundaries of Red Lake County, Minnesota. . . .

Act of February 20, 1904, 33 Stat. 46 (emphasis added). These words of cession are exactly the same as those held by this Court in *Rosebud* to be "precisely suited" to disestablishment. *Rosebud, supra* at 592, 597. In addition, the Act expressly refers to the unceded area as the "diminished reservation." 33 Stat. at 48.

The Band attempts to distinguish the statutes at hand from those considered in *Rosebud* and *DeCoteau* by noting that the Nelson Act and the 1904 Red Lake Act did not provide for a sum certain payment to the Indians but instead provided that the Indians would be paid when the lands were actually sold to homesteaders. However, this fact is not particularly relevant to the question of disestablishment. All of the statutes construed in *Rosebud* contained payment schemes like those in the Acts here in question rather than the sum certain scheme present in *DeCoteau.* As this Court stated, this fact is not dispositive and did not compel a finding that the reservation areas in question were not disestablished.[1] *Rosebud, supra* at 598 & n.20.

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[1] The Band's statement that the *Rosebud* and *DeCoteau* decisions were grounded on the fact that the Indians in these cases initially entered into agreements for a lump-sum payment, *see* Petition at 12, is not accurate and conflicts with the Court's own analysis of those decisions. *See Rosebud* at 598 n.20. In fact, neither of the 1907 and 1910 Acts interpreted in *Rosebud* originated from such an agreement, whereas the 1904 Red Lake Act actually did arise from a lump-sum cession agreement. *See* 33 Stat. at 48. In addition, the Band's reliance on the trust aspect of the cessions, *see* Petition at 14, is similarly misplaced. See *Rosebud* at 601 n.24.

An examination of the legislative history of the Acts in question and the circumstances surrounding their enactment confirms what is plain from the face of the Acts—that they were intended to disestablish the land ceded to the United States. By the Act of May 15, 1886, 24 Stat. 44, the Secretary of the Interior was authorized to negotiate with the Chippewas in Minnesota for "such change of their reservation as may be deemed desirable." Consequently, a commission was appointed by the Secretary which, as part of its duties, was to negotiate with the Red Lake Band in order to "obtain their consent to a reduction of their reservation." S. Exec. Doc. No. 115, 49th Cong., 2d Sess. at 12 (1887). In 1886, a cession agreement was reached with the Indians, *see* S. Exec. Doc. No. 115, *supra* at 22-27, but was never ratified because of objections to the method of disposition and the amount of land ceded. H.R. Rep. No. 789, 50th Cong., 1st Sess. at 5 (1888). Instead, Congress in 1889 enacted the Nelson Act, which provided for the cession of all land not needed for allotment on a number of Minnesota reservations, including the Red Lake Reservation.

Pursuant to the Nelson Act, a commission was appointed in 1889 which met with the Red Lake Band that same year. H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 66-85 (1890). An agreement was reached defining the area not needed for allotment and, as required by Section 1 of the Nelson Act, the President approved the agreement on March 4, 1890. *Id.* at 1-2.

An examination of the legislative history and attendant circumstances of the 1904 Act reveals the same congressional intent to disestablish the affected portion of the Reservation. In 1902, responding to the requests of a local mayor and the Minnesota congressional delegation, the Secretary of the Interior instructed the Commissioner of Indian Affairs to send Indian Inspector James McLaughlin, who had recently concluded the 1901 agreement with the Rosebud Sioux Indians (*see Rosebud* at 590-91), to negotiate with the Red Lake Indians for the cession of the western portion of their Reservation. *See* Letter

of E.A. Hitchcock, Secretary of the Interior, to Commissioner of Indian Affairs (February 10, 1902). Soon afterwards negotiations were entered into between Inspector McLaughlin and the Indians concerning the reduction of the Reservation and the establishment of boundaries for a new diminished reservation. *Chippewas of Minnesota,* Hearings Before the Comm. on Indian Affairs, House of Representatives, 66th Cong., 2d Sess. at 196-227 (1920). On March 10, 1902, the Indians and Inspector McLaughlin entered into an agreement for the cession and relinquishment of the western portion of the Reservation. The operative language in Article I of the Agreement, which is reproduced in the 1904 Act, is precisely the same as that of the 1901 Rosebud agreement held by this Court to have had the "unmistakable baseline purpose of disestablishment." *Rosebud, supra* at 592.

Like the 1901 Rosebud agreement, *Rosebud, supra* at 591 & n.10, the 1902 Red Lake agreement met with opposition in the same Congress because of the lump-sum payment provision. *Chippewas of Minnesota, supra* at 244; 38 Cong. Rec. 1899 (1904). Consequently, Congress passed the Act of February 20, 1904, which amended the 1902 agreement to provide for payment upon actual sale to homesteaders. As in *Rosebud, supra* at 598, "[t]here is nothing in the changed method of payment . . . which indicates that the clear intent of the . . . Agreement to diminish the Reservation boundaries had changed" between 1902 and 1904.

The jurisdictional history of the area in question subsequent to the passage of the 1889 and 1904 Acts is further evidence of the disestablishment purpose of these Acts. Significantly, the United States has never asserted that the Red Lake Reservation extends to its original boundaries,[2] and has never sought to administer the ceded, non-restored areas as part of the Reservation, but instead has consistently recognized that the reservation area was diminished by the 1889 and 1904 Acts.

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[2] Nor did it do so in the instant litigation, which it initiated.

See United States v. *Minnesota,* 446 F. Supp. 1382, 1388 (D. Minn. 1979). The repeated indications of this understanding on the part of the federal government are legion and are too numerous to list in this discussion. *See* Post-Trial Brief of Intervening Defendant Counties, *United States* v. *Minnesota, supra* at 57-92. Both the contemporaneous administrative interpretion of the Acts and the consistent, longstanding understanding of government officials are entitled to great weight. *See, e.g., Andrus* v. *Shell Oil Co.,* ____ U.S. ____, 48 U.S.L.W. 4603, 4606 (1980). *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 718-19 (1975); *Zuber* v. *Allen,* 396 U.S. 168, 192 (1969); *Leary* v. *United States,* 395 U.S. 6, 25 (1969).

The State of Minnesota, on the other hand, while it has recognized the limitations on its jurisdiction within the Diminished Reservation and restored areas, *see* Brief of State at 4, has consistently exercised full jurisdiction over Indians and non-Indians alike in the ceded, unrestored areas. *Red Lake Band of Chippewa Indians* v. *Minnesota,* 614 F.2d 1161, 1162 (1980); *United States* v. *Minnesota, supra* at 1388. As was stated in *Rosebud, supra* at 605, the "long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges."

Subsequent congressional treatment also confirms that the intent of Congress was to alter the original boundaries of the Red Lake Reservation. A number of subsequent statutes refer to the Reservation as "diminished" or to the ceded lands as being "formerly" within the Reservation. *See* Act of March 1, 1899, 30 Stat. 924, 929; Act of April 17, 1900, 31 Stat. 134, 134, 135; Act of February 8, 1905, 33 Stat. 708, 709; Act of February 16, 1911, 36 Stat. 913: Act of June 30, 1913, 38 Stat. 77, 88; Act of February 14, 1931, 46 Stat. 1102. These numerous congressional references to the status of the Red Lake Reservation

merit consideration in determining earlier congressional intent. *See Rosebud, supra* at 603 n.25; *Mattz* v. *Arnett,* 412 U.S. 481, 505 n.25 (1973).

Furthermore, decisions of this Court and other courts have consistently characterized the 1889 and 1904 Acts as having diminished the size of the Red Lake Reservation. *See e.g., Johnson* v. *Gearlds,* 234 U.S. 422, 443 (1914); *Chippewa Indians of Minnesota* v. *United States,* 80 Ct. Cl. 410, 477-78, 480-81 (1935), *aff'd,* 301 U.S. 358 (1937). In addition, the land ceded pursuant to the Nelson Act has been described as having been "formerly" within the Red Lake Reservation. *See United States* v. *Holt State Bank,* 270 U.S. 49, 52 (1926); *Chippewa Indians of Minnesota* v. *United States,* 91 Ct. Cl. 97, 105 (1940). These decisions, while not dispositive, lend strong support to a finding of disestablishment.

The only reasonable conclusion to be reached after examining all of the available material is that the 1889 Nelson Act and the 1904 Act were plainly intended to disestablish the portions of the original Reservation ceded under the Act. The Band's assertion that the decisions of the courts below conflict with prior decisions of this Court is without merit. In fact, the opposite is clear: applying the principles stated in the recent decisions of this Court, the courts below could have reached no other conclusion. Both the operative language and the factual circumstances of the Acts at issue are virtually indistinguishable from those of the Acts construed in *Rosebud* and *DeCoteau.*

II. THE DECISION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE MINNESOTA SUPREME COURT INTERPRETING THE NELSON ACT.

The Red Lake Band argues that certiorari should be granted to review the decision of the Court of Appeals because of a conflict with other judicial interpretations of the effect of the Nelson Act. Petition at 11-12. While it is the position of the

Respondent Counties that the instant case was correctly decided below, the Counties agree that a serious conflict exists between the State and federal courts which merits resolution by this Court.

Despite the unmistakable cession language contained in the Nelson Act, the Minnesota Supreme Court in *State* v. *Clark,* 282 N.W.2d 902 (Minn. 1979), *cert. denied,* ____ U.S. ____, 100 S.Ct. 1080 (1980), held that the Act was not intended to disestablish the 1863 White Earth Reservation. In so doing, it reaffirmed its decision in *State* v. *Forge,* 262 N.W.2d 341, 347 (Minn. 1977), *appeal dismissed,* 435 U.S. 919 (1978),[3] in which it held, with minimal discussion, that the Nelson Act was not intended to disestablish the historic Leech Lake Reservation.[4] Both of these reservation areas were affected by the same Nelson Act language providing for "cession and relinquishment" of reservation lands. All of the Leech Lake lands were

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[3] The court also relied heavily on the federal District Court decision in *Leech Lake Band of Chippewa Indians* v. *Herbst,* 334 F. Supp. 1001 (D. Minn. 1971), which held that the historic Leech Lake Reservation was not disestablished by the Nelson Act. It should be noted that the court's decision in *Leech Lake* was based primarily upon the opinion of this Court in *Seymour* v. *Superintendent,* 368 U.S. 351 (1962), the court not having had the benefit of the later *Rosebud* and *DeCoteau* decisions which interpreted statutes more closely analogous than that construed in *Seymour.* The conflict created by the Eighth Circuit's interpretation of legislative intent in the instant case necessarily results in the effective overruling of *Leech Lake.* However, in spite of the decisions in the instant case, the federal courts' treatment of the Nelson Act has itself been complicated by the conflicting state court treatment. In *White Earth Band of Chippewa Indians* v. *Herbst,* Civ. No. 3-74-63 (D. Minn., order filed May 30, 1980), the District Court has applied the principles of collateral estoppel to prevent the reconsideration in federal court of the status of the portion of the 1867 White Earth Reservation considered in *Clark.*

[4] The Court's opinion in *Forge* appears to be almost entirely based on the erroneous assumption that the taking of allotments by Indians on their historic reservation was inconsistent with reservation disestablishment. This belief is squarely at odds with this Court's decision in *DeCoteau, supra. See also Rosebud, supra.*

to be ceded under the Act, and, at White Earth, as at Red Lake, the cession was to encompass all lands not required for allotments.[5] The Minnesota court's construction of the Act's cession language is wholly inconsistent with this Court's decision in *Rosebud* and *DeCoteau,* which interpreted virtually identical language regarding the Lake Traverse and Rosebud Reservations. *See also DeCoteau, supra* at 439 nn.21 & 22, 446 (similar language in other cession agreements in same statute); *Ellis* v. *Page,* 351 F.2d 250, 251-52 (10th Cir. 1965); *Tooisgah* v. *United States,* 186 F.2d 93, 97-98 (10th Cir. 1950): *Hawkins* v. *Crist,* No. CV-76-99-BLG (D. Mont., January 27, 1978), *State* v. *Bad Horse,* 7 Indian L. Rep. 4012 (Mont. 1980).

The ruling of the Court of Appeals that the boundaries of the Red Lake Reservation "were clearly diminished" by the Nelson Act, 614 F.2d at 1162, and its affirmation of the District Court's holding that the purpose of the Act was "to restore the land to the public domain," 466 F. Supp. at 1386 n.1, 1387, are fundamentally incompatible with the Minnesota court's ruling that "congressional intent to terminate [reservation status] is lacking from the Nelson Act." *Clark, supra* at 906. This conflict creates uncertainty concerning the effect of the Nelson Act on the reservation status of the area in question, and is therefore of great concern to the Respondent Counties. The significance of this question to the counties goes far beyond the issue of state

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[5] Under the principles stated in *DeCoteau,* which involved similar circumstances, it must be concluded that the underlying purpose of the cession was to disestablish the entire White Earth Reservation, including the area set aside for allotments. While this analysis would seem to apply equally to the Red Lake Reservation, other circumstances support a conclusion that the Red Lake Reservation was merely diminished by the Nelson Act cession and not totally disestablished. First, the unceded portion of the Reservation was never allotted, *e.g., Chippewa Indians of Minnesota* v. *United States,* 90 Ct. Cl. 140, 144 (1940), unlike the White Earth Reservation, and the process contemplated by the Nelson Act was therefore never completed. Secondly, the 1904 cession Act expressly recognizes the area retained by the Red Lake Indians as the "diminished reservation."

and county jurisdiction over Indian hunting and fishing on non-trust lands within the confines of the historic reservation. If the Nelson Act is interpreted not to have had the purpose of disestablishment, then the degree of jurisdiction which the State and Counties can exercise in the ceded portions of the original Red Lake Reservation is severely limited. *See, e.g., DeCoteau, supra* at 427 n.2.[6] Moreover, portions of other historic reservation areas affected by the Nelson Act are contained within the boundaries of three of the Respondent Counties: Clearwater (White Earth), Beltrami (Leech Lake), and Koochiching (Nett Lake). Therefore, because of the great importance to the Counties of the issues presented by this case, the Counties ask that certiorari be granted in order to resolve the conflict between State and federal courts. *See DeCoteau, supra* at 430-31.

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[6] Public Law 280, which extends some types of State jurisdiction into Indian country in Minnesota, does not apply to the Red Lake Reservation. 18 U.S.C. § 1162; 28 U.S.C. § 1360.

CONCLUSION

For the foregoing reasons, the Respondent Counties respectfully suggest that certiorari be granted.

Respectfully submitted,

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